APPENDIX A.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAJORITY OPINION
DISSENTING OPINION

No. 7082

OCTOBER TERM, 1939, APRIL SESSION, 1940

In the Matter of
GLOBE VARNISH COMPANY,
A Corporation,
Debtor.

S. L. NUDELMAN, Director of Finance of the State of Illinois,
Claimant-Appellant,

vs.

GLOBE VARNISH COMPANY,
A Corporation,
Debtor-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

JULY 23, 1940

Before SPARKS and MAJOR, *Circuit Judges*, and LINDLEY, *District Judge*.

SPARKS, *Circuit Judge*. The Globe Varnish Company is in reorganization proceedings under section 77B of the

Bankruptcy Act. Appellant, the Director of Finance of Illinois, filed a claim in the sum of $1,594.87 for taxes alleged to be due under the Illinois Retailers' Occupation Act. 1937 Illinois Revised Statutes, chapter 120, §§440 *et seq.*, pertinent parts of which we set forth in the margin.[1]

The debtor filed objections to the claim. It was referred to the referee as special master, and after a hearing he allowed the claim in full and so reported. Upon hearing before the District Court it disallowed a portion of the claim in the sum of $560.57, holding that that amount represented taxes on sales in interstate commerce. From that order this appeal is prosecuted.

The facts are not disputed. The debtor was engaged in selling tangible personal property for use or consumption. It is an Illinois corporation with its main place of business in Chicago. The railroad companies to whom the sales in question were made had offices and freight stations in that city. The transactions of sale were all similar, and Exhibit 1, which is an order for paint, is typical. That exhibit was a written order placed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereafter referred to as the Railroad) with the debtor for nine drums black locomotive finishing paint, in 55 gallon, one-time containers, at $1.10 per gallon, f. o. b. Chicago. The

1. § 440, ¶ 1. "'Sale at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales."

§ 441. "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of two per cent (2%) of the gross receipts from such sales in this State of tangible personal property made in the course of such business upon and after the taking effect of this Act and prior to July 1, 1935, and at the rate of three per cent (3%) of the gross receipts from such sales on and after July 1, 1935. * * * However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce * * *."

order requested the debtor to ship the order to the Railroad, care of storekeeper (consignee) 1029-183, (Destination) Milwaukee Shops, Wisconsin, via the Railroad, junction nearest point of shipment, unless otherwise specified. The routing instructions contained the following: "Deliver to C. M. St. P. & P. R. R. Freight Station." The order further stated that the receipted bill of lading must accompany the invoice and be sent to the purchasing agent, and that the seller should strictly comply with all instructions and specifications.

The debtor complied with the order in all respects and delivered the paint properly consigned to the consignee at Milwaukee, to the freight station of the railroad named, together with a standard form of bill of lading prescribed by the Interstate Commerce Commission. It was receipted by the freight agent, and a copy given to the debtor, and the shipment was handled precisely as it would have been handled had the consignee been a purchaser other than the Railroad, that is to say, a way bill was issued in accordance with the bill of lading, the paint was placed in the car and transported directly to the destination at Milwaukee, Wisconsin. This method of sale and delivery had been pursued by the parties in precisely the same manner for twenty-four years.

We agree with appellant that state taxes which may indirectly burden interstate commerce have been upheld. *Nashville Ry.* v. *Wallace*, 288 U. S. 249, and analogous cases. It also has been held that where a carrier purchases supplies for its subsequent use in interstate commerce, neither the purchase nor the storage is exempted from a non-discriminatory state tax, because the interim between the delivery and the subsequent shipment by the purchaser in interstate commerce gives the property a taxable situs in the state where stored. *Edelman* v. *Boeing*

Air Transport Co., 289 U. S. 249. See also *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, and cases there cited. In other words, during the interim of rest, the stream of interstate commerce had ceased, or had not begun. In the McGoldrick case, it was also held that, although the purchase was a transaction in interstate commerce, the tax was a valid exercise of state power, because it was laid alike upon interstate and intrastate sales, and there was no discrimination.

Was the transaction in interstate commerce? We think it was, just as clearly, if not more so, than in the case of *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434. The facts are stipulated that the paint was purchased in Illinois, under instructions from the buyer for the seller to consign it to Milwaukee, Wisconsin, deliver it to a freight station of a specified railroad in Chicago, secure a receipted bill of lading, and deliver the receipted bill to the buyer's purchasing agent. These instructions were fully complied with, and the transportation was continuous from the time the paint left the seller's place of business until it reached its destination in Milwaukee.

Appellant contends, or rather intimates, that the transportation in interstate commerce did not begin, if at all, until the property was delivered by the seller to the freight agent at Chicago. If this principle is adopted, the seller in the business described in the statute, and those similarly situated, could never engage in interstate commerce, and the exception in the statute is a useless provision. We think there is no merit in this contention.

Appellant further contends that, in as much as title had passed to the Railroad in Illinois, subsequent transportation thereof outside the State by the Railroad was not in interstate commerce.

It is quite true, as a general rule, that title to property passes to a vendee when it is delivered by a vendor to a carrier f. o. b. The rule applies, however, only where there is an absence of a different intention, for it has always been recognized, by courts and legislatures, that where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. *United States* v. *Hecht*, 11 F. 2d 128. In the instant case, we think it makes no difference when the title passed, and we are unable to perceive how that fact, whenever it occurred, could be determinative of the character of the sale, as to whether it was an interstate or an intrastate transaction. The fact that the buyer at the time of the purchase might pay the shipping charges to the seller, or might direct the seller to ship it f. o. b. at place of shipment would not, it seems to us, alter the character of the transaction in the least. Under such circumstances the title would pass precisely the same as it did in the instant case, and to no greater extent. In each case there was and would be a lack of delivery of possession.

It is contended, however, by appellant that there was a delivery of possession to the buyer at the freight station in Illinois, and that at all times thereafter the buyer had complete possession, domination and control of the property. This we think is an erroneous conclusion, arising from the fact that the buyer in this case was also the public carrier, and of course, was acting in a dual capacity. The decisions which we have hereinbefore cited recognize this dual capacity, and, in the absence of fraud, approve of its application. It is no longer debatable that a public carrier in carrying its own property is governed by the same rules which control the transportation of other property except as to charges.

Hence, the delivery of this property at the freight station in Chicago was not made to the buyer, but to the carrier. The buyer had no possession of it or right to possession of it, until it arrived at Milwaukee. That this was the clear intention of the parties can not be doubted. They thought they were engaged in an interstate transaction which was not subject to the Occupation Tax of Illinois. They knew that if the paint were sold and delivered to the buyer in Illinois, and stored or held by it for any length of time in Illinois for its future use beyond state lines, the occupational tax of Illinois would be collectible, because under such circumstances the stream of interstate commerce would not yet have started. Under such circumstances the railroad might have been liable for many different taxes, discussed in the various decisions, upon this property held in storage or otherwise. It is not a fair statement of the record to say that both parties knew that the railroad intended, after receiving the purchased wares, to transport them to points outside the state. The most that can be said is that both parties intended that the seller should consign the paint to Milwaukee via the buyer's railroad. The record discloses the reasons for this intention to be: (1) Not a drop of the paint was to be used in Illinois, it was all to be used in Milwaukee; (2) it was desired to avoid any delivery of possession to the buyer in Illinois, thus avoiding a reshipment or a reconsignment by the buyer, which might brand the transaction as an intrastate one and rightfully subject the seller to the Illinois Occupation Tax.

The considerations for the agreement to carry out these intentions were obvious and are in the record. If it was an intrastate transaction, the tax was due from the seller, and it was authorized to pass it on to the buyer and would have done so. Hence when the buyer ordered the paint

to be consigned and shipped to Milwaukee, the only place where it was needed or could be used by the buyer, the latter was relieved from paying the tax, upon the condition that possession of the property would be withheld from the buyer until it reached Milwaukee. It is not claimed that fraud or bad faith permeated any part of this transaction, although it was intimated in argument that the transaction and its results were preconceived, and planned by the parties. To do so would not be unlawful, for every voluntary act is the product of a thought. However, such planning, if any may be inferred, certainly occurred long before the enactment of the Illinois Act, for this transaction was merely a repetition of what these same parties had been doing for a quarter of a century.

Moreover, complete title presupposes free use, control and possession by the owner or his agent, hence the Railroad's title to this property was not untrammeled as between it and the seller until the delivery was made in Milwaukee. Its obligation to deliver according to the consignment was as binding on it as it would have been on any other carrier, and the seller as against the buyer had a right to rely upon its strict performance, for it was this that was determinative of its right to exemption from the tax. If the obligation had been violated by the Railroad, and the paint had remained in Illinois, the seller's remedy perhaps would not have been by way of defense to the State's claim, but by action against the Railroad, for the violation of its contract. That phase of the case, however, is moot, for delivery was made according to the consignment. It is mentioned only as bearing upon the Railroad's right of complete use, control and possession of the property before delivery at Milwaukee, which we think it did not have.

It is further contended by appellant that state taxation

directly placed on interstate commerce is not of itself invalid, unless it is capable of being imposed by every state through which the shipment passes. This may be true. However, as Wisconsin has the right to levy a compensating use tax on property such as here involved, Illinois, aside from the exemption, cannot validly levy a privilege tax measured by the proceeds of the sale, as this would result in two taxes upon an interstate sale, while a local sale would be subject to only one. See *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167; *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue, supra.* See also *McGoldrick* v. *Berwind-White Co., supra.*

Appellant further contends that where a carrier transports its own materials or property across state lines for its own use, it is not interstate commerce. We think the contrary is true under the facts here presented. See *The Pipe Line Cases,* 234 U. S. 548; *Valvoline Oil Co.* v. *United States,* 308 U. S. 141. See also *Wood Preserving Corp.* v. *Dep't of Treasury,* decided by us this term.

It is further contended by appellant that the carrying of goods in carts, trucks or other vehicles to the depot where the journey is to commence is not part of interstate commerce. It relies on *Coe* v. *Errol,* 116 U. S. 517, and analogous cases. In those cases the seller made no consignment beyond state lines. The goods were delivered to the buyer and held in possession by it for its future use if, when, and where it might require. It is clear that those facts are not analogous to those here.

Decree.

AFFIRMED.

LINDLEY, *District Judge*, Dissenting.

I am of the opinion that the taxes were legally assessed. The debtor, engaged in selling merchandise in Illinois, with its chief place of business in the City of Chicago, from time to time, sold to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, having offices and freight stations in Chicago, certain manufactured materials, each order emanating from an Illinois office of the railroad company. In each instance the railroad company delivered to the debtor an order for merchandise to be delivered f.o.b. Chicago, at the local freight station of the railroad, consigned to one of the latter's out of state shops. The debtor, accepting the orders, delivered the materials to the freight station in Chicago and received bills of lading acknowledging receipt of the material for shipment outside of the state. The railroad then transported the merchandise to its out of state office to which it was consigned. An employee of the railroad company testified, "we carry our material to our shops at Milwaukee."

The Illinois Retailers Act imposes a privilege tax upon persons engaged in the selling of tangible personal property for use and consumption, the amount of the tax being determined by the volume of sales. The act expressly provides that it shall not apply to the privilege of engaging in business in interstate commerce. Chapter 120 Illinois Revised Statutes, Sections 441, 441-A; *Reif* v. *Barrett*, 355 Ill. 104.

Upon delivery of merchandise by a seller to a common carrier for transportation, pursuant to contract of sale, title passes to the purchaser. *City of Carthage* v. *Duvall*, 202 Ill. 234; *Golo Slipper Co.* v. *Hamilton Shoe Stores Co.*, 43 F. (2d) 33, 34; *United States* v. *Hecht*, 11 F. (2d) 128, 135; *In re Arctic Stores*, 258 Fed. 688, 690. Under a contract of sale, f.o.b. a certain point, title passes

to the buyer at the time of delivery to the carrier at that point. *Price* v. *Neiman Bros. Co.*, 240 Ill. App. 157, 162; *Nelson Bros.* v. *Perryman-Burns*, 48 F. (2d) 99, 100; *Higgins* v. *California Prune Growers*, 16 F. (2d) 190, 192; *Hoffman* v. *Gosline*, 172 Fed. 113, 117. When this vendor delivered the merchandise to the carrier in Chicago, receiving bills of lading acknowledging receipt of the merchandise, under contracts of sale providing for delivery f.o.b. Chicago title passed to the purchaser. Performance of the contract of sale was completed in Illinois, *People* v. *Young*, 237 Ill. 196 at 201. The seller parted with its title there; the purchaser acquired title there. Thereafter the property was that of the vendee, and the seller had no interest therein. The property was from that time thenceforth under the domain and control of the buyer, who alone was endowed with the right to recover for damage thereto in transit, *Pacific Exp. Co.* v. *Spaulding & Co.*, 199 Ill. App. 474. The sales were completed in Illinois, title passed in Illinois, and the taxes assessed in no wise conflict, infringe upon or cast a burden upon interstate commerce.

It may well be that these well-known principles of law as to the passing of title do not apply if it appears that the parties intended differently; but the record is silent as to any such intention. It discloses merely that it was known to both parties that the railroad intended, after receiving the purchased wares, to transport them to points outside the state. And it appears further that the railroad considered itself the owner of the merchandise after delivery in Chicago, for the testimony was that it transported its own materials to points outside the state.

True, when a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. But the

carrying of goods in carts, trucks or other vehicles to the depot where the journey is to commence is no part of such commerce. *Coe* v. *Errol,* 116 U. S. 517. The intent to forward the property, after being received, to another state does not exempt it from taxation. *Bacon* v. *Illinois,* 227 U. S. 504; *Minnesota* v. *Blasius,* 290 U. S. 1. The goods "were delivered to the so-called consignee before they started and were in its hands throughout," to do with as it liked. *Superior Oil Company* v. *Mississippi,* 280 U. S. 390. The purchase and supply of equipment for uses which constitute interstate commerce is not so identified with that commerce as to make the sale immune from a tax imposed by the state. *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission,* 285 U. S. 147. In *Edelman* v. *Boeing Air Trans. Inc.,* 289 U. S. 249, the court said that a state may validly tax the "use" to which gasoline is put in withdrawing it from storage within the state and placing it within the tanks of the planes, notwithstanding its ultimate function is to generate motive power for carrying on interstate commerce. Of similar import is *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249.

The bare fact that one intends to transport material purchased in interstate commerce does not relieve him from non-discriminatory state taxation which adds to the cost of his business. And taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carriers of others within the taxing state. In still other cases, taxation has been rejected only because the apportionment was found to be inadequate or unfair. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250. Here the taxation produces no direct burden on commerce but only the same incidental and indirect effect which results from the pay-

ment of property taxes or of like taxes by residents of Illinois; it cannot amount to a regulation of interstate commerce. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459. In *Graybar Electric Co., Inc.* v. *Curry,* 189 So. 186, affirmed, 308 U. S. 513, where a company had entered into a contract of sale requiring that certain merchandise be shipped in interstate commerce, and the question was whether such transaction was exempted from the state sales tax on the ground that it constituted a burden upon interstate commerce, the court said:

"* * * It was no benefit to the purchasers that the goods were to be shipped 'in interstate movement' for the reason that the price of the goods would be the same, whether shipped 'in interstate movement' or not. Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama. The transactions were Alabama sales within the provision of the Alabama Sales Tax Law. The form or language of the customers' orders cannot affect the case.

"It is not 'within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause.' "

In *McGoldrick, Comptroller of the City of New York* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, a seller, with sales offices in New York, contracted there to sell and deliver in that city, coal produced at its mines in Pennsylvania and shipped to New York for delivery. The city imposed a tax upon the purchases, measured by the sales price under a statute so providing. The Supreme Court held that such tax did not infringe the commerce clause of the constitution; that it was assessed upon transfer of

title, consummated wholly within the state. The court could find no adequate ground for holding that the tax was a regulation which, in the absence of Congressional action, the commerce clause forbids. Mr. Justice Stone writing the opinion, used this language:

"* * * the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. * * * we have sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfillment of the contract. *Wiloil Corporation* v. *Pennsylvania, supra,* 173; *Graybar Electric Co.* v. *Curry, supra.* * * * Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. *Coe* v. *Errol, supra; Bacon* v. *Illinois, supra; Federal Compress & Warehouse Co.* v. *McLean,* 291 U. S. 17. For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into."

It is not a question of whether Congress might rightfully intervene with regulatory legislation. Nor are we concerned with the question of how far the Congress might legitimately go in legislation affecting the validity of the state tax, for it has not seen fit to take any action in that respect. In view of the statements by Mr. Justice Stone in the case last cited, in the absence of Congressional action, I feel that the court is not justified in con-

cluding that the tax unlawfully burdens interstate commerce.

For these reasons, I believe the judgment should be reversed.

Endorsed: Filed July 23, 1940. Kenneth J. Carrick, Clerk.

APPENDIX B.

OPINION RENDERED IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In the Matter of
GLOBE VARNISH COMPANY,
A Corporation,
Debtor.
S. L. NUDELMAN, Director of Finance of the State of Illinois,
Claimant,
vs.
GLOBE VARNISH COMPANY,
A Corporation,
Debtor.

Proceedings for Corporate Reorganization Under Section 77-B
No. 68333

MEMORANDUM.

This matter comes on to be heard on the exceptions of the Debtor to the Supplemental Report of Carl R. Chindblom, Referee in Bankruptcy, as Special Master, which report recommended the allowance of Claim No. 47, in the sum of $1594.87, filed by the Illinois Department of Finance.

Claim No. 47 is for taxes levied by authority of the Illinois Retailers Occupation Tax Act (Sec. 441, Chap. 120, Ill. Stats.) which reads in part:

"A tax is imposed upon persons engaged in the busi-

ness of selling tangible personal property at retail in this State at the rate of two per cent of the gross receipts from such sales in this State of tangible personal property made in the course of such business * * *. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State."

The taxes were imposed on receipts from certain sales of paints and varnishes made by the Debtor, Globe Varnish Company, located in Chicago, Illinois.

The larger part of the claim represents taxes on receipts from sales made by the Debtor to various railroad companies having purchasing departments in Chicago. The materials purchased were shipped, on orders of the railroads' Chicago purchasing departments, to various cities outside the state of Illinois, to be used by the railroads in their repair shops.

The Debtor contends that the receipts from these sales to the railroads are not taxable under the Retailers Occupation Tax Act of Illinois.

17 The Act provides (Sec. 451, Chap. 120 Ill. Stats.):

"The department (of Finance) is authorized to make, promulgate, and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this Act as may be deemed expedient."

The brief of the State sets forth certain rules promulgated pursuant to the above-quoted statutory provision, and, among others, the following:

"Sales of fuel, equipment and supplies in Illinois to railroad companies for use or consumption constitute

sales within the meaning of the Retailers' Occupation Tax Act. Such transactions are not in interstate commerce if delivery of fuel, equipment and supplies pursuant to the sale is made by the seller from one point in Illinois to a second point in Illinois. It is immaterial that, subsequent to the sale, the purchasing railroad company may transport the goods outside Illinois for use or consumption, since such interstate movement is not a part of the sale of the goods to the user or consumer." (Rule 76.)

"The primary characteristic of interstate commerce as it relates to the Retailers' Occupation Tax is the physical movement of tangible personal property across State boundary lines as an essential and not an incidental part of the sale of such tangible personal property.

* * * * *

"The tax does not extend to gross receipts from sales in which the seller is obligated under the terms of the agreement to make physical delivery of the goods sold from a point in the State to a point outside the State. Nor does the tax apply to receipts from a sale where the seller, by carrier or by mail, delivers the goods sold from a point in this State to a point outside the State, on order of the buyer. It is immaterial whether the goods are sold f.o.b. origin or f.o.b. destination." (Rule 5.)

18 The evidence shows that the railroads' printed order blanks directed the Debtor to ship the materials to the railroads at points outside the State, that the Debtor trucked the materials to the freight stations of the railroad companies in Chicago, and that the station agents issued to Debtor a carbon copy of a bill of lading, acknowledging receipt of the merchandise from the debtor, as shipper. An assistant purchasing agent of one of the railroads testified:

"This practice is no different in buying material today than it has been in the 24 years that I have been in the department. We have the shop at Milwaukee, and we have to service it with material. We have a freight station at Chicago, at Union Street, which accepts deliveries by truck from the various manufacturers, and we haul it to our shop at Milwaukee." (R. 71.)

* * * * *

"This particular shipment, when it comes to our freight station, is handled by our freight department, and their own way bill is issued, in accordance with the bill of lading, placed in a car and transported to the destination as shown on here (referring to the bill of lading)." (R. 77.)

The court is of the opinion that, under the terms of the agreements between the Debtor and the railroads, the movement of the materials across State lines was an essential part of the sales, and that, therefore, the sales were transactions in interstate commerce and not subject to the tax. Said claim should be disallowed to the extent that it represents taxes on the receipts from sales of this kind to the railroads.

19 As to the sales of paints and varnishes made by the Debtor to painting contractors within the state of Illinois, the Debtor contends that the receipts for those sales should not be taxed because they were not "sales at retail" within the meaning of Section 1 of the Act which contains this definition (Sec. 440, Chap. 120, Ill. Stats.):

" 'Sales at retail' means any transfer of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration."

The recently decided case of *Acme Printing Ink Co.* v. *Nudelman,* 371 Ill. 217, appears to be in point here. In

that case it was held that those engaged in the business of manufacturing and selling printing ink to printers and lithographers are subject to the Retailers' Occupation Tax Act, as the printers and lithographers are the users or consumers of the printing ink in the production of printing matter, and the ink is tangible personal property in which personal service, skill and artistic ability have entered only to a comparatively small degree, the primary occupation being the manufacture and sale of the ink and not the rendering of service. The court believes that the sales to the painting contractors were "for use or consumption and not for resale" and that the claim should be allowed to the extent that it represents a tax on the receipts from sales to the painting contractors.

Counsel for the Debtor may, at 10 o'clock A. M., on Wednesday, July 5, 1939, present a draft of an order giving effect to the views herein expressed.

Barnes
Judge.

June 29, 1939.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 662

IN THE MATTER OF GLOBE VARNISH COMPANY, A CORPORATION, DEBTOR.

S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

GLOBE VARNISH COMPANY, A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION TO JURISDICTION
and
BRIEF FOR THE RESPONDENT IN OPPOSITION.

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SUBJECT INDEX.

Table of Cases Cited.

Statutes.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 662

IN THE MATTER OF GLOBE VARNISH COMPANY, A CORPORATION, DEBTOR.

S. L. NUDELMAN, DIRECTOR OF FINANCE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OBJECTION TO JURISDICTION.

The petitioner is not a party to the cause.

The jurisdiction of this Court is sought to be invoked by petitioner under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. 347 (a), providing that it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, to require by certiorari that a cause be certified to this Court by a Circuit Court of Appeals for determination.

By the Act of February 13, 1925, 28 U. S. C. A. 350, it is provided that no writ of certiorari, intended to bring any judgment or decree before this Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree. The judgment of the Circuit Court of Appeals which petitioner seeks to have reviewed was entered on July 23, 1940. (R. 112) A petition for rehearing was filed on August 6, 1940 (R. 112), and thereafter, on October 1, 1940, said petition for rehearing was denied (R. 113).

On December 31, 1940, three months after the date of the denial of said petition for rehearing, the petition for writ of certiorari was filed with the Clerk of this Court seeking a review of said final judgment of the Circuit Court of Appeals.

The original claim for Retailers' Occupation Tax was filed in the District Court of the United States for the Northern District of Illinois (R. 3), and the appeal to the Circuit Court of Appeals was prosecuted by S. L. Nudelman, Director of Finance of the State of Illinois.

Subsequent to the denial of the petition for rehearing by the Circuit Court of Appeals and on October 9, 1940, S. L. Nudelman resigned as Director of Finance of the State of Illinois, and, on the same day, A. M. Carter was duly appointed and qualified as such Director of Finance, all as fully appears by the duly exemplified certificates of the Secretary of State of the State of Illinois on file with the Clerk of this Court and exact copies of which are set forth in Appendix *infra*.

At the time the petition for writ of certiorari was filed with this Court by said S. L. Nudelman, he was completely separated from the office of Director of Finance

of the State of Illinois and totally without right to invoke such a review or exercise any authority or discretion in regard to a review of said judgment.

It therefore appears that no petition for writ of certiorari was filed in this Court by *any party* having authority to invoke the jurisdiction of this Court within the three months' period prescribed by statute.

A similar situation was presented to this Court in the case of *Davis* v. *Preston,* 280 U. S. 406, 74 L. ed. 514, arising under Section 206 of the Transportation Act of 1920, as amended, 49 U. S. C. A. 74 (h). In that case, a judgment was obtained against James C. Davis, as Federal Agent, which was affirmed by the Supreme Court of the State of Texas. Within the statutory three months' period of time, Davis, describing himself as Federal Agent, petitioned this Court for a review on certiorari and the petition was granted. Upon oral argument of the case before this Court it appeared that, at the time the petition for certiorari was filed, Davis had ceased to be Federal Agent and had been succeeded in that office by Andrew W. Mellon. In denying a motion for substitution and in dismissing the writ of certiorari, this Court stated on pages 408 and 409:

> "The succession in office, as now appears, occurred before there was any effort to obtain a review in this court. After the succession Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his petition must be disregarded. The time within which such a review may be invoked is limited by statute and that time has long since expired. To grant the motion in these circumstances would be to put aside the statutory limitation and to subject the party prevailing in the state court to uncertainty and vexation which the limitation is intended to prevent.

"The provisions relating to substitution which were added to Section 206 of the Transportation Act of (February 28) 1920 (41 Stat. at L. 461, chap. 91) by the Act of March 3, 1923, chap. 233, 42 Stat. at L. 1443, U. S. C. title 49, Section 74, are cited in support of the motion. But, even when they are liberally construed, as they probably should be, they disclose no purpose either (a) to enable a former Federal Agent to invoke a review by this court of a judgment which is of no legal concern to him, or (b) to modify or enlarge the prescribed statutory period for invoking the reviewing power of this court."

For the reasons hereinabove set forth, respondent submits that this Court has no jurisdiction to entertain the petition for writ of certiorari filed herein by S. L. Nudelman after he had resigned as Director of Finance.
